ERVIN J. POWERS

IBLA 79-156 Decided January 30, 1980

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting simultaneous oil and gas offer to lease, NM-35363.

Reversed and remanded.

1. Oil and Gas Leases: Applications: Sole Party in Interest -- Words and Phrases

"Interest." Where an oil and gas leasing service selects lands, files offers, and advances funds on behalf of its clients for leases which the service is willing to sell on behalf of any successful client, strictly at the client's option, in return for a percentage commission on the sale, the service has no enforceable right to any portion of the lease, if issued. The option is no more than a mere hope or expectancy that a client will elect to employ the service as sales agent, so that there is no interest in the lease if issued, which must be disclosed.

2. Oil and Gas Leases: Applications: Filing

Where the owner of a leasing service has no interest in the offers prepared and submitted by him on behalf of his clientele, an offer on the same parcel filed by the owner in his own name does not constitute a prohibited multiple filing.

3. Evidence: Generally -- Evidence: Sufficiency

Exclusive use of a leasing service address on offers to lease, promotional material which emphasizes the sales ability of the

> service, past use of a form agreement which created an enforceable interest in prospective leases, past actions of the leasing service related thereto, and allegations of a tacit understanding between the service and its clients are speculative and insufficient as a matter of law to demonstrate the existence of a scheme which might cause rejection of the offers under 43 CFR 3112.5-2.

APPEARANCES: William R. Hamm, Esq., Quarles & Brady, Milwaukee, Wisconsin, for appellant; Don M. Fedric, Esq., Hunker-Fedric, P.A., Roswell, New Mexico, for protestant/appellee.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Ervin J. Powers appeals the decision of the New Mexico State Office, Bureau of Land Management (BLM), rejecting his simultaneous oil and gas lease offer, NM-35363.

Appellant's offer to lease parcel NM 094 was the first drawn in the public drawing held November 7, 1978, pursuant to the provisions of 43 CFR 3110. The second drawn entry card was that of B. F. Fields. On November 9, 1978, Fields filed a protest against issuance of the lease to Powers. In connection with submitting the instant lease offer, and presumably other offers, appellant engaged the leasing services of Fred L. Engle d.b.a. Resource Services Company, Inc. (hereinafter RSC). By reason of such service agreement, Fields in his protest asserted that Engle had an undisclosed interest in the lease as defined at 43 CFR 3100.0-5(b); that appellant had failed to comply with 43 CFR 3102.7, pertaining to other parties in interest; that the undisclosed interest and the offer submitted by Engle in his own name, together constitute a multiple filing in violation of 43 CFR 3112.2-1(a); and that RSC has, by promotion and tacit understanding, contrived a scheme or plan as defined at 43 CFR 3112.5-2, which creates for it a greater probability of obtaining an interest in a lease.

By letter dated November 21, 1978, BLM advised Fields that it would conduct an investigation of the circumstances of appellant's offer, pending which the protest was properly held in abeyance. Additional proof was requested of and provided by appellant.

Ultimately, by decision dated December 28, 1978, appellant's offer was rejected, on the following grounds:

> 1. The service agreement between appellant and RSC created an interest in the lease, 43 CDR 3100.0-5(b), which required compliance with 43 CFR 3102.7;

2. Since Engle d/b/a RSC has an interest in appellant's lease and also filed an offer to lease NM 094 for his own benefit, there was a prohibited multiple filing, 43 CFR 3112.5-2;

3. The drawing entry cards of 343 clients of RSC were held for rejection on the assumption that they have identical service agreements with RSC;

4. The statement stamped on the service agreement purporting to extinguish an earlier agreement between appellant and RSC is insufficient to nullify the prior agreement because it is neither signed nor dated by both parties.

The appeal from the decision was timely noted. The decision names Fields an adverse party, and he has accordingly submitted his brief in opposition. For purposes of the appeal, Fields is designated the protestant/appellee. We shall reserve consideration of his brief until after our discussion of the decision to reject appellant's offer.

The record includes copies of two service agreements between appellant and RSC. One agreement, dated June 17, 1974, contains language which creates an exclusive sales agency in RSC and provides for a percentage interest in any lease issued to the client. This Board has previously ruled that these provisions constitute an interest subject to mandatory disclosure. See Geosearch, Inc., 39 IBLA 49 (1979); Alfred L. Easterday, 34 IBLA 195 (1978) 1/; Sidney H. Schreter, 32 IBLA 148 (1977).

RSC subsequently persuaded appellant to sign a second agreement dated April 14, 1978, a copy of which also appears in the record. The operative language of the current agreement provides as follows:

SALES AGENCY AVAILABLE

When I win a drawing, R.S.C. provides, at my option, the service to sell the rights I have won. This agency contract for sale is available only after the drawing is completed. Any final negotiated price is subject to my approval. If I utilize R.S.C.'s agency contract for sale and they or I obtain a buyer during the 5-year term of the contract, I understand the service fee to R.S.C. is as follows: * * *. [Emphasis supplied.]

1/ Appeal on remand pending. Coyer v. Andrus, Civ. No. C-78-213, June 20, 1978 (D. Wyo.).

In addition, the current service agreement bears the conspicuous statement: "This revised agreement replaces the one currently in effect."

The dispositive questions presented are whether the current agreement creates in RSC an undisclosed interest in the lease, and whether the allegations of the protestant/appellee are sufficient to establish a scheme within the meaning of 43 CFR 3112.5-2.

[1] Regarding the first issue, we hold that the above-quoted language of the current agreement vests no interest in RSC. As we stated in Geosearch, Inc., supra:

> Where an oil and gas leasing service selects lands, files offers, and advances funds on behalf of its clients for leases which the service is willing to sell on behalf of any successful client strictly at the client's option in return for a percentage commission on the sale, the service has no enforceable right to any portion of the lease, if issued.

39 IBLA at 53. Virginia L. Jones, 34 IBLA 188, 193 (1978); R. M. Barton, 4 IBLA 229, 232 (1972).

The language under scrutiny creates no more than a mere hope or expectancy that the client will elect to engage RSC as sales agent. Thus, there was no interest which appellant was required to disclose under 43 CFR 3102.7.

[2] It must follow that there was in these circumstances no prohibited multiple filing, 43 CFR 3112.5-2. It is true that Engle submitted his own offer to lease parcel NM 094, despite the fact that Engle d.b.a. RSC had undertaken to file offers on the same parcel for 343 clients.

Engle's practice may well establish a prima facie breach of the fiduciary duties he owes to his clients, but in the absence of a vested interest in the lease, such action does not constitute a multiple filing as contemplated by the regulation, 43 CFR 3112.5-2. Our holding on this point might be quite different if, for example, Engle's entry card had gained first priority, as will be evident from the following discussion of the theory advanced in the dissent.

The dissent would impose a constructive trust upon any lease issued to Engle. For purposes of this discussion we will accept as true the underlying assumptions that (1) Engle's relationship to each client is that of principal and agent; (2) that Engle therefore owes fiduciary duties not to take unfair advantage, not to compete against, or act in a manner adverse to, the offers submitted on

behalf of his clients; (3) that the clients are unaware of the duties owed them and that they are competing against Engle in addition to other RSC clients and members of the public generally; and (4) that the clients have not consented to, nor authorized, Engle's competition.

On these assumptions, the theory proceeds as follows: If Engle files a DEC, his clientele could file suit in equity for breach of the fiduciary duties owed them, relief for which includes the constructive trust, among other remedies. Assuming the claim could be sustained, and assuming further that the lease is impressed with a constructive trust, each client of RSC would then possess a beneficial interest in Engle's offer irrespective of whether it has gained a priority. As a result, Engle would be required to disclose the names of all persons for whom he had filed offers on the same parcel, or face rejection of his offer. 43 CFR 3102.7. In these circumstances an interest within the meaning of the regulation exists because each client possesses a right of action against Engle which could ultimately result in the imposition of a constructive trust.

In the related instance where Engle has filed an offer and the offer of an RSC client is first drawn, there would exist no interest which must be disclosed by that client in his or her individual offer. However, under the dissent's view of the matter, each offeror would hold a beneficial interest in Engle's offer by reason of the constructive trust in addition to his or her own offer. Thus, Engle's offer, the first drawn offer, and the offers of every other client would be subject to rejection as a prohibited multiple filing. 43 CFR 3112.5-2.

It is this result which renders the constructive trust theory untenable. The Department would be in the anomalous position of imposing a constructive trust to protect RSC's client where the end result of such a constructive trust would be rejection of the client's offer as a multiple filing. It is an established maxim that equity may intervene only to do equity. 27 Am. Jur. 2d, Equity §§ 118-119 (1965). In the latter situation, the presumptively innocent offeror is deprived of first priority and therefore issuance of the lease solely by reason of the alleged misconduct of Engle. As we have indicated, a very different case would be presented if Engle's offer were first drawn.

The New Mexico State Office is undoubtedly familiar with the operations of Engle d.b.a. RSC, yet it was incorrect for BLM to hold the 343 offers for rejection solely on the assumption that those entrants have an identical arrangement with RSC. However, as we must reverse the decision rejecting appellant's offer, and as the second and third drawn offers apparently are not those of RSC clients, we hold the error harmless as to this case.

The final theory upon which the decision rests concerns the printed statement, supra, which purports to extinguish or modify the 1974 service agreement between appellant and RSC. It is the contention of BLM that without the dated signature of both parties, the disclaimer is inadequate to accomplish that objective as a matter of law.

There can be no doubt as to the legal efficacy of the current agreement. It is supported by sufficient consideration whether deemed a modification or a rescission of the former agreement. 17 Am. Jur. 2d, Contracts §§ 461, 469 (1964). Neither appellant nor protestant/appellee alleges lack of the requisite mutual assent which would invalidate the current agreement.

A contract is not necessarily invalid because undated. Id. § 69. We note that that is not precisely the case before us. Appellant has in fact printed and signed his name to the agreement, dated it, and furnished his address. In the absence of a statute or agreement of the parties requiring mutual subscription, a written contract signed by one party is sufficient in law, provided the other party acquiesces therein. Id. § 70. No statute or precedent is cited to show that a contrary conclusion is dictated. Moreover, the parties to the agreement have clearly accepted the terms thereof and acted accordingly, which is tantamount to formal execution. Id. We therefore find that the fourth ground assigned in the decision is error.

In view of the foregoing discussion all that remains is the question of whether RSC has, as the protestant/appellee charges, contrived a scheme within the meaning of 43 CFR 3112.5-2. That regulation provides in material part:

> § 3112.5-2 Multiple filings.
>
> When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or partly [sic] acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease or interest therein, in any public drawing, held pursuant to § 3110.1-6(b), all offers filed by either party will be rejected. [Emphasis supplied.]

It should be noted at the outset that usage of the term "scheme" has been carefully defined to exclude "conspiracy," which requires

agreement among the actors involved. United States v. Cohen, 145 F.2d 82 (2d Cir. 1944), is correctly cited as authority for the proposition that "[a] scheme means a design or plan formed to accomplish some purpose."

Protestant/appellee acknowledges the circumstantial nature of his allegations, but argues that close analysis of 43 CFR 3112.5-2 shows two distinct situations are contemplated. The above-quoted portion of the regulation, it is asserted, deals with covert filing arrangements; the remaining portion covers filing service agents who operate overtly. Protestant/appellee apparently concedes that the current agreement between RSC and appellant is not violative of the latter provisions of the regulation. Nevertheless, it is contended that there exists a pattern of conduct on the part of RSC, the totality of which constitutes a scheme. The contentions are summarized as follows.

The agreement formerly utilized by RSC and invalidated by this Board in Easterday and Schreter, supra, is demonstrative of Engles' (d.b.a. RSC) true intentions. In the view of protestant/appellee, the original motivation behind RSC's attempt to contractually guarantee itself an interest in any leases won by its clients is not dissipated, as the revenue obtainable under the former agreement far exceeds the $20 fee per drawing RSC presently charges its clientele.

Protestant/appellee also points to the manner in which Engle d.b.a. RSC unilaterally attempted to disclaim his interests in prospective leases under the former arrangement, which this Board examined at length in Easterday, supra. In that case we held that Engle had not communicated his "amendment and disclaimer" to the client until after the client had won a lease. It is suggested that the conduct in Easterday is not an isolated incident, and further, that the facts of that case provide objective circumstantial evidence of the scheme alleged.

It is also argued that the promotional literature of RSC, a fair sample of which is included in the record, repeatedly and ardently emphasizes the sales ability of RSC, the many successful and lucrative package it has negotiated in the past, and the necessity of its expertise to prospective clients. The inference is that the tenor of the promotional material overrides and negates any but the sales services RSC offers, upon which it is said RSC knowingly relies.

It is further asserted that the exclusive use of RSC's mailing address on simultaneous offers guarantees that prospective purchasers or assignees must first contact RSC. Again the inference is that the optional nature of the sales agency is reduced to a near-nullity in the client's mind when confronted by RSC with a potential offer to purchase the leasehold at what is likely a handsome profit.

Finally, it is asserted that in cases such as this one, where RSC and the client have previously acted under the former service agreement, that fact together with all of the above creates a tacit and abiding understanding between RSC and its client that its sales service will in fact be utilized.

[3] We have in other appeals considered these and similar allegations, and we are constrained to find that such allegations are speculative and insufficient as of matter of law to demonstrate a scheme as contemplated by 43 CFR 3112.5-2. Even a case founded purely on circumstantial evidence nonetheless must ultimately point to an objectively perceptible violation. That is not the case here. RSC has not violated any regulation which could properly be explained by circumstantial evidence such as that urged by protestant/appellee.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded to BLM for action consistent herewith.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

James L. Burski
Administrative Judge

Frederick Fishman
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

The majority in this case would award the lease to Ervin J. Powers without any further inquiry into the circumstances of the filings in the simultaneous filing-drawing procedure in which his offer was drawn with first priority. I disagree. Where there is sufficient evidence which suggests that there has been a violation of the regulations pertaining to simultaneous filings of oil and gas lease offers, this Board has ordered further investigation. Lee S. Bielski, 39 IBLA 311 (1979). I believe the present case warrants such an investigation.

Among the factual matters asserted for the first time is an allegation by the number two drawee, protestant-respondent in this appeal, that Fred L. Engle also filed a drawing card in the same filing in which he submitted cards for Powers and other clientele of Resource Services Company (RSC). He also alleges that RSC and Fred L. Engle are one and the same. The fact that Engle filed competing offers in the drawings for the same parcels he filed offers in behalf of his clientele was not shown in the other cases involving Engle and RSC cited in the majority opinion (particularly the Geosearch cases). Although there has been a response from Powers to the allegations made by the protestant, including an affidavit by Engle, there has been no denial by Engle or appellant of these allegations. For the purpose of this discussion then, we shall assume that the Fred L. Engle who filed the competing offer and the Fred Engle who is president of RSC are one and the same and that RSC is completely owned and controlled by Engle.

Accordingly, it appears that the entity Resource Services Company is Fred Engle's operating name. Engle is the president and has signed all correspondence and other documents for the company. In the court proceedings and other matters shown in this record he has referred to himself as "Fred Engle d/b/a Resource Services Company." There is no basis for his being able to use a corporate or other business identity to cloak his own identity in this matter apart from the company. Thus, we must conclude that if RSC has some interest in its client's offers Engle would have an interest in those offers and any offer filed by him in the same drawing would violate the multiple filing prohibition. The converse also should be true, namely, that if Engle filed an offer for himself in a filing where RSC has also filed offers for clients, there would be a violation of the multiple filing prohibition if the clients would have any interest in the offer filed by Engle in his own name or in the name of RSC.

Even assuming separate identities of Engle and RSC, as the major officer of the company, Engle would have a fiduciary duty to the company not to take actions which would cause Departmental regulations to be violated by him and by clients of the company. Cf. McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955). The clients could claim from Engle the same fiduciary duties owed to them by the company.

In effect here, Engle, d/b/a, RSC, is the agent for the clients of RSC in these simultaneous filing procedures. As an agent his duties and obligations are imposed by the contractual arrangement and also by additional law-imposed duties not specifically changed by the contract. In this regard, there is a general principle of law that "[U]nless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency." Restatement (Second) of Agency § 393 (1958); 3 Am, Jur. 2d, Agency § 222 (1962). Further, if an agent having a fiduciary obligation not to compete violates that duty to his principal (beneficiary), the courts will require that the property acquired by the fiduciary be held as a constructive trust for the beneficiary. Restatement of Restitution § 199 (1937).

In the agreements shown by Engle with Powers there is no provision that Engle can compete with Powers by filing offers for himself or RSC. In the absence of a clear understanding and agreement with his clients, we must conclude that the general law-imposed duty of an agent not to compete with his principals must apply here. Thus, in any filing where Engle filed an offer for himself or RSC and also filed for his clients he violated a fiduciary obligation to his clients. Thus, they would have a right to seek equitable relief, including the imposition of a constructive trust upon any lease issued to Engle. This is within the meaning of an interest in a lease as defined by regulation 43 CFR 3100.0-5(b) to include:

> Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease. [Emphasis added.]

The crucial time involved, as this definition shows, is the time an offer is filed. Thus, it is irrelevant whether or not Engle won a lease. The point of reference is whether, at the time he filed his offer, his clients would then have a future claim to any advantage or benefit if a lease were issued pursuant to Engle's offer. See H. J. Enevoldsen, 44 IBLA 70, 86 I.D. (1979). Because the law-imposed fiduciary duty not to compete arises from the agreement between RSC and the clients, that duty and all rights arising therefrom are "based upon * * * any agreement or understanding" and are thus within the meaning of the regulation quoted above.

We realize that Powers and other clients may not have known that Engle was filing competing offers. This may, at first blush, appear unfair to hold that the winning offer of Powers or other clientele of Engle should be rejected because of an equitable claim they may have

against him. Nevertheless, the interest of B. F. Fields and Lawrence Ruckdashel, the second and third drawees, must also be protected by the Department under McKay v. Wahlenmaier, supra. It is the Powers' grant of agency which places Engle in a position where he could make the prohibited multiple filings. We believe any appropriate redress for the Powers grievance is in the courts against violation of the fiduciary duty, and not in this Department where the Secretary is constrained to apply the regulations to all parties, especially where the rights of conflicting applicants are involved. See McKay v. Wahlenmaier, supra.

The issue here takes on another aspect, if we consider several possible factual situations. In this case, it appears there may have been many of RSC's clientele who participated in the filing for the same parcel. It is conceivable that for a given parcel only 2 offers would be filed -- that of Engle for himself and also for only one of his clients. There would seem to be no question in that case that the client could claim a violation of the fiduciary duty not to compete where he did not know Engle was filing the competing offer. Likewise, it should make no difference how many other offers are filed for Engle's clients or how small their individual equitable share would be in any constructive trust imposed against Engle.

Accordingly, we conclude that if Engle or RSC filed offers of their own for the same parcels in the same drawing as any of their clients, the clients would have a claim or interest in the offers and there would be a violation of the disclosure of the interest regulations (43 CFR 3102.7) and that regulation prohibiting multiple filings (43 CFR 3112.5-2). In that case Engle or RSC's offers and those of all of their clients would have to be rejected in accordance with the regulations. 1/

It strikes us as anomalous that the majority distinguishes between factual situations where Engle's offer is the winning offer and also presumably between situations where there may be one or many of Engle's clientele with whom he is competing for a lease offer. The essential point is the same: there can be a prospective claim by any or all of those clientele to an advantage or benefit from a lease at the time the offers are filed. It is the possibility of a claim, not proof that the claimant will definitely prevail in a court of law and

1/ Powers' actual knowledge is not controlling here. The cards were filled out by Engle, except Powers' signature. As agent, Engle's knowledge must be attributable to Powers. Powers' remedy should be against Engle in an appropriate court for violation of a duty owed to the client. We need not decide or speculate upon any defenses Engle might raise in an equity court. The essential point here is that there is a claim which Powers can raise against Engle, which claim existed at the time the offers were filed.

equity, which should be the governing criterion. The majority concedes that if Engle wins there might be a violation of the regulations. I would reemphasize that our controlling regulation, 43 CFR 3100.0-5(b), does not make the time for the claim to be in effect the date a winning offer is drawn or a lease is issued, but, rather, the date the offer is filed. Thus, whether under a constructive trust theory that his clientele may use against him or because he has fostered a scheme or arrangement whereby he or his clientele has an additional chance to gain an interest in a lease, there has been a violation of the regulations prohibiting multiple filings and requiring a declaration of interests in the offers.

Therefore, I would either call upon Powers and Engle to establish that the facts are not as stated by respondent and given above, or remand the case to BLM for further investigation of this and other cases to assure there have been no violations of the regulations in other filings under circumstances similar to those here.

Joan B. Thompson
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Edward W. Stuebing
Administrative Judge